CIMB Bank Bhd v Anna Wee Chiaw Sek @ Nur Anisa

HIGH COURT (KUCHING) — KCH-11B-5/10 OF 2015
RHODZARIAH BUJANG J
24 FEBRUARY 2016

Banking — Banks and banking business — Overdraft facility — Appellant granted overdraft facility to respondent — Respondent failed to pay — Appellant sued respondent for outstanding amount — Whether appellant proved amount owing to them by respondent — Whether appellant's claim barred under Sarawak's Limitation Ordinance

This was an appeal by the appellant against the decision of the magistrate court in dismissing the appellant's claim against the respondent for the sum of RM50,955.78 being the amount outstanding in an overdraft facility granted to the respondent ('Juwara account'). The appellant called one Chai Tze Nen ('PW1') who held the post of personal financial consultant as its witness. PW1 admitted that he had no personal knowledge of the actual transactions in the account but gave evidence 'based on the recollection of data, documents, computer system, particulars and information' which he had access throughout. The issues for court's determination were: (a) whether the appellant had proved the amount owing to them by the respondent; and (b) whether the appellant's claim was barred under the Sarawak's Limitation Ordinance ('the Ordinance').

Held, allowing the appeal with costs of RM10,000:

(1) The fact that PW1 was not an officer of the bank who had personal knowledge of the transactions or the facility granted could not be fatal to the appellant's claim as he had access to all the records kept by the bank for this account. With regards to the payment of RM40,000 made by the respondent into the Juwara account, the bank had adduced evidence from PW1 that there were withdrawals made from the said account. Therefore, the contention of the respondent that the payment of RM40,000 settled that Juwara account leaving a zero balance was not borne out by the documents. Thus, the bank's burden of proof which was on a balance of probability had been discharged (see paras 5–6).

(2) Clause 10 of the letter of offer for the Juwara account provides clearly that the overdraft facility was payable on demand. In this case, the letter of demand was dated 20 July 2011 and the letters to recall the facility were dated 10 August 2011 and 3 May 2012 respectively. Thus, since this action was filed in April 2013, it was well within the six years limitation period under Item 94 of the Schedule to the Ordinance ('the Schedule')

A and even if the applicable provision was Item 40 of the Schedule, the institution of the action was still within the three years provided thereunder (see paras 11–12).

[Bahasa Malaysia summary

B Ini adalah rayuan oleh perayu terhadap keputusan mahkamah majistret dalam menolak tuntutan perayu terhadap responden bagi wang sejumlah RM50,955.78 sebagai jumlah yang belum dibayar dalam kemudahan overdraf yang diberikan kepada responden ('akaun Juwara'). Perayu memanggil seorang
C yang bernama Chai Tze Nen ('PW1') yang memegang jawatan perunding kewangan peribadi sebagai saksinya. PW1 mengaku yang dia tidak mempunyai pengetahuan peribadi mengenai transaksi sebenar dalam akaun tersebut tetapi memberi keterangan 'based on the recollection of data, documents, computer system, particulars and information' yang mana dia
D mempunyai akses keseluruhannya. Isu-isu untuk penentuan mahkamah adalah: (a) sama ada perayu telah membuktikan jumlah yang kena dibayar kepada mereka oleh responden; dan (b) sama ada tuntutan perayu adalah dihalang di bawah Ordinan Had Masa Sarawak ('Ordinan').

E **Diputuskan**, membenarkan rayuan dengan kos sebanyak RM10,000:

(1) Fakta bahawa PW1 bukan pegawai bank yang mempunyai pengetahuan peribadi mengenai transaksi atau kemudahan yang diberikan adalah tidak serius kepada tuntutan perayu kerana dia mempunyai akses kepada
F kesemua rekod yang disimpan oleh bank bagi akaunnya. Berkenaan kepada bayaran RM40,000 yang dibuat oleh responden ke dalam akaun Juwara, bank telah mengemukakan keterangan daripada PW1 bahawa terdapat pengambilan wang yang dibuat daripada akaun tersebut. Oleh itu, hujahan responden bahawa bayaran sebanyak RM40,000 selesaikan
G akaun Juwara meninggalkan baki kosong tidak disokong oleh dokumen-dokumen. Oleh itu, beban pembuktian bank yang mana adalah atas imbangan kebarangkalian telah dilepaskan (lihat perenggan 5–6).

H (2) Klausa 10 surat tawaran bagi akaun Juwara memperuntukkan dengan jelas bahawa kemudahan overdraf adalah boleh dibayar atas tuntutan. Dalam kes ini, surat tuntutan adalah bertarikh 20 Julai 2011 dan surat-surat untuk menarik balik kemudahan masing-masing adalah bertarikh 10 Ogos 2011 dan 3 Mei 2012. Oleh itu, memandangkan
I tindakan ini difailkan pada April 2013, ia adalah dalam tempoh had masa enam tahun di bawah Item 94 Jadual kepada Ordinan ('Jadual') dan walaupun peruntukan yang beraplikasi adalah Item 40 Jadual, permulaan tindakan adalah masih dalam tiga tahun yang diperuntukkan di bawahnya (lihat perenggan 11–12).]

Notes

For cases on overdraft facility, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 2751–2768.

Cases referred to

Bian Chiang Bank Bhd v Kwong Hing Cheong [1978] 2 MLJ 193, FC (distd)
Bradford Old Bank Ltd v Sutcliffe [1918] 2 KB 833, CA (refd)
Parr's Banking Co Ltd v Yates [1898] 2 QB 460, CA (refd)
Sim Kiang Chiok v Southeast Asia Special Asset Management Bhd [2016] 1 MLJ 57, CA (refd)

Legislation referred to

Limitation Ordinance (Cap 49) Schedule, Items 40, 94

Angela Liaw (Sia Alvin Wong & Partners) for the appellant.
Lee Chuan Eng (Ee & Lim Advocates) for the respondent.

Rhodzariah Bujang J:

[1] CIMB Bank Bhd ('the bank') sued Anna Wee Chiaw Sek @ Nur Anisa in the magistrate court for the sum of RM50,955.78 being the amount outstanding as the 30 April 2013 in an overdraft facility granted to her by the bank vide its letter of offer dated 24 August 1995 and letter of undertaking to pay dated 29 August 1995. After a trial which saw the bank calling one witness but with Anna Wee opting not to call any, the bank's claim was dismissed with cost. This judgment is written in respect of the bank's appeal against the said dismissal. The bank's counsel, Ms Angela Liaw has rightly identified in her written submission two issues for my determination in this appeal and they are:

(a) whether the bank has proved the amount owing to them by Anna Wee; and

(b) whether the bank's claim is barred under Sarawak's Limitation Ordinance.

PROOF OF THE CLAIM

[2] The bank called one Chai Tze Nen who held the post of personal financial consultant and who candidly admitted that he had no personal knowledge of the actual transactions in the account but gave evidence 'based on the recollection of data, documents, computer system, particulars and information' which he had access throughout. He admitted in cross-examination that he was never an employee of Bank Bumiputra, from whom Bumiputra-Commerce Bank Bhd (the bank's former name) obtained or was vested Bank Bumiputra's right over the said overdraft facility. Anna Wee's

counsel, Mr Lee Chuan Eng made much of the fact that during the interlocutory proceedings, it was one Hussain bin Mohd Yusoff, the bank's Head of Recovery and Credit Recovery Section who affirmed all the affidavits used during those proceedings. However, the bank's counsel, Ms Angela Liaw raised this one pertinent evidential point in her written submission before me — the statement of accounts served on Anna Wee at pp 74–97 of the appeal record Vol 1 dated 20 May 2011–30 April 2013 with the amount outstanding have this caveat printed at the upper right hand corner of all the said statements.

> ALL INFORMATION AND BALANCES SHOWN IN THE STATEMENT ARE DEEMED CORRECT, UNTESS THE BANK IS INFORMED OF ANY DISCREPANCIES WITHIN 14 DAYS OF THE STATEMENT OF THE DATE. THE SIGN '..' AGAINST ANY BALANCES DENOTES A DEBIT BALANCE.

[3] However, I noted that the last statement of account for April 2013 shows that the amount outstanding as at 30 April 2013 is RM50,955.78 whereas the amount claimed by the bank in their statement of claim is RM50,628.06 outstanding as at 9 April 2013. Nevertheless, it being a lesser sum that is claimed and due at an earlier date the difference should not stand in the way of a judgment for the bank.

[4] Anna Wee, not having adduced any evidence, needless to say was unable to show that she had reverted to the bank within fourteen days of the date of the statements to dispute the amount stated therein and according to cl 23 of the letter of offer dated 29 August 1995, the 'Bank's calculation of the amount due shall be conclusive unless manifestly incorrect'.

[5] In the face of these documentary exhibits, the fact that PW1 was not an officer of the bank who had personal knowledge of the transactions or the facility granted cannot be fatal to the plaintiffs claim for as he had stated, he had access to all the records kept by the bank for this account. As per PW1's evidence, the undisputed fact was that Anna Wee were granted two overdraft facilities by the bank — the first by a letter of offer dated 24 August 1995 which is the subject matter of the court action ('the Juwara account') and the other by a letter of offer dated 6 October 1995. The account number for the facility under the letter of offer dated 6 October 1995 was 1105–0015685–05–01 and that account has a zero balance. With regards to the payment of RM40,000 made by Anna Wee into the Juwara account, the bank has adduced evidence from PW1 at Q&A 26 and 27 of his witness statement and the statements at pp 106–107 and 111 of the appeal record, Vol 1 that there were withdrawals made from said the account. Therefore, the contention of Anna Wee pleaded in her statement of defence that the payment of RM40,000 settled that Juwara account leaving a zero balance is not borne out by the documents. The

aforesaid statements mentioned above have all been addressed and sent to Anna Wee at her address at No 6989, Lorong 5 Jalan Stampin.

[6] In the letter of offer for the Juwara account Anna Wee also agreed at cl 18(a) thereof to pay costs, charges and expenses incurred by the bank in relation to the said overdraft facility and under cl 18(1) to pay interest which if unpaid would be compounded monthly as provided under cl 7 of the same letter. Therefore once again, even if PW1 has no personal knowledge of the charging of these items as specified above but the documentary evidence presented at the trial is sufficient enough to enter judgment given the said banking documents are not of such a nature that the witness who produced them in court must have personal knowledge of the content of the same. Bearing in mind also that the bank's burden of proof is only on a balance of probability that burden in my view has been discharged in this case.

LIMITATION PERIOD

[7] Anna Wee's counsel, Mr Lee Chuan Eng submitted that the applicable item under the Schedule to the Limitation Ordinance is Item 40 as it was a clean 'overdraft' after the full settlement of the account on 5 August 2005. Item 40 provides as follows:

40.	For money lent Under an agreement that it shall be payable on demand.	Three years	When the loan is made

[8] Ms Angela Liaw however submitted that the applicable provision in the said Ordinance is Item 94 which provides as follows:

94.	For compensation for the Breach of a contract in writing ...	Six years	When the period of limitation would begin to run against a suit brought on a similar contract not in writing.

[9] She relied on the recent Court of Appeal decision of *Sim Kiang Chiok v Southeast Asia Special Asset Management Bhd* [2016] 1 MLJ 57 which incidentally was in respect of a decision of mine which was overturned by the Court of Appeal. In the said case, the contract to be enforced against the guarantor was one in a letter of guarantee and indemnity and the Court of Appeal held that Item 94 is the applicable provision.

[10] I am of course bound by the decision of the Court of Appeal and the application of its ratio to this case since the contract here is also one in writing given the acceptance in that form (at p 61 of the appeal record, Vol 1) by Anna

wee of the letter of offer dated 24 August 1995. The question is when should time run against the bank. Mr Lee Chuan Eng referred to the Federal Court case of *Bian Chiang Bank Bhd v Kwong Hing Cheong* [1978] 2 MLJ 193 where he had also acted for the respondent and which is also on the issue at hand ie when time is to run for an overdraft account which was in debit. The Federal Court held, affirming the High Court finding that no demand for repayment was necessary to make the overdraft an enforceable debt and that the overdraft became due and payable at the time when each loan was made. Two English cases, ie *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833 and *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460 were cited by the Federal Court in support of the said proposition. Mr Lee Chuan Eng therefore submitted that time starts to run from 15 August 2005 after the alleged full settlement of the account on 5 August 2005. Ms Angela Liaw however pointed out in her written submission and to which I have to again agree with her that *Bian Chiang*'s case is distinguishable because the overdraft facilities in that case were granted orally. This can be seen from the statement of facts made by Chang Min Tat FJ which I now quote below:

> This case posed certain difficulties which all sprang from the fact that the *overdraft facilities were granted apparently without any terms and conditions,* save as to the condition for repayment, which was necessarily to be implied. Rule 11 of the Bank's Rules governing the operating of all current accounts states that overdrafts are allowed only after due arrangement has been made with the Bank. *The arrangement in this case would, however, appear to have been made orally and in the absence of any averment in the statement of claim which the respondent admitted, in the absence of any affidavit evidence that such a term existed, there does not appear to be any term that the overdraft was repayable on demand.* (Emphasis added.)

[11] In this case before me, cl 10 of the said letter of offer for the Juwara account provides clearly that it is payable on demand and here the letter of demand was dated 20 July 2011 (at p 67 of the appeal record, Vol 1) and the letters to recall the facility were dated 10 August 2011 (at p 68 of the appeal record, Vol 1) and 3 May 2012 (at p 69 of the appeal record, Vol 1), respectively.

[12] Thus, when this action was filed in April 2013, it was well within the six years limitation period under Item 94 and even if I was wrong to say that and ltem 40 is the applicable provision in the Limitation Ordinance, the institution of the action was still within the three years provided thereunder.

[13] Based on the foregoing considerations, I am moved to allow the appeal of the bank against the decision of the learned magistrate and substitute the same with judgment as prayed in para 8(a) and (b) of the statement of claim and with cost of RM10,000 here and below.

Appeal allowed with costs of RM10,000.

Reported by Dzulqarnain Ab Fatar